IN THE HIGH COURT OF JUDICATURE AT BOMBAY.
CIVIL APPELLATE JURISDICTION.

SECOND APPEAL NO. 82 OF 2004.

Shri Hari Trimbak Aher .. Appellant.
Vs.
1. Fakira Bahiru Aher (Since deceased) his legal heirs.

1-A Smt. Sarswatibai Fakira Aher.

1-B Daulat Fakira Aher

1-C Balu Fakira Aher.

1-D Sau. Suman Baburao Dhomse.

1-E Sau. Sitabai Alias Eatbai Ashok Jadhav

2. Sampat Kisan Aher.

3. Ganpat Kisan Aher.

4. Shankar Kisan Aher.

5. Narayan Kisan Aher.

6. Smt. Savitrabai Kisan Aher. .. Respondents.

Shri P.N. Joshi for the Appellant.

Shri G.S. Godbole for Respondent No.1B.

CORAM : A.S. OKA, J.
DATE : 28TH JULY, 2004.

ORAL JUDGMENT

. Heard Counsel appearing for the parties.The Appellant is the original Plaintiff. A suit was filed

by the Appellant/Plaintiff for declaration that the decree passed in Regular Civil suit NO.23 of 1978 is bad and illegal and is not binding on him. In the suit the Appellant also prayed for perpetual injunction. The trial Court partly decreed the suit. The Trial Court declared that the decree passed in R.C.S.No. 23/1978 was not binding on the Appellant and therefore, the Decree passed in the suit is not executable. However, the relief of perpetual injunction was denied to the Appellant. An appeal was preferred by the Appellant in the District Court. Cross objection was filed by the original Defendants/Respondents. By Judgment and Decree dated 20th June, 2003, the learned Additional District Judge, Nasik dismissed the Appeal filed by the appellant. The learned Judge held that the suit filed by the Appellant was not maintainable. Therefore the decree passed by the trial Court in favour of the Appellants was set aside. The learned Additional District Judge held that in view of the provisions of order 21 rule 97 of the Code of Civil Procedure, 1908, the suit filed by the Appellant was not maintainable. The appellate Court referred to an application filed under Order 21 Rule 97 by the Appellant in the Executing Court which was rejected. The Appellate Court held that the suit itself was not maintainable, the decree passed

by the trial Court granting declaration in favour of the Appellant was required to be set aside. However, the Appellate Court also considered the merits of the case of the Appellant and held that the appellant has failed to prove the case on merits.

2. The learned Advocate appearing for Appellant brought to my notice that the application which was earlier made by the Appellant in the executing court for invoking the provisions of Order 21 Rule 97 of the said Code was not dismissed on merits but was dismissed on the ground that the same was not maintainable. He pointed out that the appeal preferred by the appellant against the said order was also dismissed only on the ground that the application made under order 21 rule 97 was not maintainable. The leaned Advocate appearing for the respondent No.1B pointed out that the judgment of the appellate Court in the said matter was confirmed by this Court in a writ petition filed by the Appellant. The learned Counsel for the Appellant submitted, that as the said application was dismissed, a separate suit came to be filed by the Appellant and he submitted that now the suit cannot be dismissed on the ground that it is not maintainable. He submitted that in so far as findings which are recorded by the appellate Court are

concerned, the same are perverse and need to be interfered with in second appeal under section 100 of the said Code.

3. In view of the provisions of order 21 rule 97 read with rule 101 and 103 of order 21, the suit filed by Appellant was not maintainable. The reliance placed by the appellate Court on the judgment of Apex Court reported in (1997) 3 Supreme Court Cases 694 (Brahmdeo Chaudhary Vs. Rishikesh Prasad Jaiswal and another) was right. Considering the scheme of order 21, the Apex Court has taken a view that a separate suit cannot lie on the basis of the contentions which are raised by the Appellant. Therefore, no fault can be found with the approach of the Appellate Court, when the Appellate Court held that the suit was clearly barred.

4. In view of this position, the courts below could not have considered the merits of the contentions raised by the Appellant. All those contentions will have to be considered by the executing court in view of section 47 read with rule 101 of order 21 of the said Code, as held by the Apex Court in the case of Brahmdeo Choudharyu (Supra).

5. In view of this position, this Appeal cannot be entertained as the finding recorded by the Appellate Court on the issue of maintainability of the suit is legal and proper. However, it must be noted that the earlier application made by the Appellant under order 21 rule 97 of the Code was dismissed on the ground that the same was not maintainable. It appears that the said application was rejected much prior to the Judgment of the Apex Court in the case of Brahmdeo Chaudhary. Therefore, notwithstanding the dismissal of the Second Appeal and the rejection of the earlier Application made to the executing Court, the remedy of the Appellant to approach the executing Court will be always open. Subject to these observations, second appeal is dismissed. No order as to costs.

(A.S. OKA, J.)